Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1962

No. 85-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAUL R. RIDDICK, JR., *et al.*,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, *et al.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1815

Paul R. Riddick, Jr., and Phelicia Riddick, infants, by Paul R. Riddick, their father and next friend,

Cynthia C. Ferebee, Johnny Ferebee, Gary Ferebee, and Wilbert Ferebee, infants, by Rev. Luther M. Ferebee, their father and next friend,

Anita Fleming, infant, by Blanche Fleming, her mother and next friend,

Darrell McDonald and Carolyn McDonald, infants, by Ramion McDonald, Sr., their father and next friend,

Eric E. Nixon and James L. Nixon, infants, by Patricia Nixon, their mother and next friend, Johnny Owens; Trent Owens; Myron Owens, Shawn Owens, and Antonio Owens, infants, by Annette Owens, their mother and next friend; Paul R. Riddick, Rev. Luther M. Ferebee, Blanche Fleming, Ramion McDonald, Sr., Patricia Nixon, and Annette Owens,

Appellants

versus

UNITED STATES COURT OF APPEALS

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Paul R. Riddick, Jr., and Phelicia Riddick, infants, by Paul R. Riddick, their father and next friend,

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Darrell McDonald and Carolyn McDonald, infants, by Ramion McDonald, Sr., their father and next friend,

Eric E. Nixon and James L. Nixon, infants, by Patricia Nixon, their mother and next friend, Johnny Owens; Trent Owens; Myron Owens, Shawn Owens, and Antonio Owens, infants, by Annette Owens, their mother and next friend; Paul R. Riddick, Rev. Luther M. Ferebee, Blanche Fleming, Ramion McDonald, Sr., Patricia Nixon, and Annette Owens,

Appellants

versus

The School Board of the City of Norfolk Thomas G. Johnson, Jr., Dr. John H. Foster, Dr. Lucy R. Wilson, Jean C. Bruce, Cynthia A. Heide, Robert L. Hicks, Hortense R. Wells,

Appellees

The Lawyers' Committee for Civil Rights Under Law,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, Chief Judge. (C/A 83-326N)

Argued January 8, 1985
Decided February 6, 1986

Before WIDENER, SPROUSE and ERVIN, Circuit Judges.

Henry L. Marsh, III (S. W. Tucker; Randall G. Johnson; Hill, Tucker & Marsh, on brief) and Julius Levonne Chambers (James M. Nabrit, III: Napoleon B. Williams, Jr.; Gwendolyn Jones Jackson; Delk, James & Jackson: Elizabeth Turley; Little, Parsley & Cluverius, on brief) for Appellants; Jack E. Greer (J. Anderson Stalnaker; M. Wayne Ringer; Williams, Worrell, Kelly & Greer; Philip R. Trapani, on brief) for Appellees; William Bradford Reynolds, Assistant Attorney General (Charles J. Cooper, Deputy Assistant Attorney General; Michael Carvin, Department of Justice, on brief) for Amicus

Curiae United States: (Fred N. Fishman; Robert H. Kapp; Norman Redlich; William K. Robinson; Conrad K. Harper; Eleanor M. Fox: Richard E. Meade: Simpson Thacher & Bartlett, on brief) for Amicus Curiae The Lawyers Committee for Civil Rights Under Law.

WIDENER, Circuit Judge:

The plaintiffs, Paul R. Riddick and others, appeal the district court's refusal to invalidate a new pupil assignment plan for the elementary schools (grades K-6) of the City of Norfolk. Under the new assignment plan, mandatory cross-town busing, required at first by court order in 1971, is abolished. In its place, students are assigned in most instances to neighborhood schools, with a transfer provision with free transportation for minority students who desire it.[1] Plaintiffs contend that adoption of the

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[1] Secondary schools are not affected by the plan. Busing is continued for them.

new assignment plan was racially motivated and that its implementation violates their constitutional rights under the Fourteenth Amendment to the United States Constitution. We affirm.

I. Background

To better understand the issues involved in the instant appeal, the history of litigation arising out of racial segregation in Norfolk's public schools should be examined. Prior to the Supreme Court's opinion in Brown v. Board of Education, 347 U.S. 483 (1954), segregation of public schools in Norfolk and elsewhere in Virginia was sanctioned by state law.

In 1956, litigation began which sought the integration of Norfolk's public schools. Beckett v. School Board of the City of Norfolk, 148 F.Supp. 430 (E.D. Va.), aff'd 246 F.2d 325 (4th Cir.), cert.

den. 355 U.S. 855 (1957). Following intervention of additional plaintiffs, the case became styled Brewer v. School Board of the City of Norfolk, see 349 F.2d 414 (4th Cir. 1965) (referred to herein as Brewer or Beckett).

In 1970, this court upheld a finding that the Norfolk school board operated a dual school system based on race. Brewer, 434 F.2d 408, 410 (4th Cir.), cert. den. 399 U.S. 929 (1970). The district court was ordered to implement a plan in order to achieve a unitary school system in Norfolk. Brewer, supra, at 412. Following the Supreme Court's decision in Swann v. Charlotte-Mecklenburg Board of Education. 402 U.S. 1 (1971), the court again remanded Brewer to the district court for implementation of a desegregation plan conforming with Swann's expanded scope of remedies. Brewer, sub nom. Adams

v. School District No. 5, Orangeburg Co., S.C., 444 F.2d 99 (4th Cir), cert. den. 404 U.S. 912 (1971).

Following remand, the district court adopted a desegregation plan which utilized pairing and clustering of schools in Norfolk, as well as cross-town busing in the assignment of students to accomplish desegregation. This court affirmed implementation of the busing plan with a modification of the plan to provide for free transportation for those students bused. Brewer v. School Board of the City of Norfolk, 456 F.2d 943 (4th Cir.), cert. den. 406 U.S. 933 (1972).

Three annual reports by the school board were reviewed by the district court following its 1971 order. In 1975, the district court determined that racial discrimination had been eliminated

from the Norfolk school system and that the school system had become unitary. Therefore, the district court dismissed the Beckett action. The full text of that order is:

ORDER

It appearing to the Court that all issues in this action have been disposed of, that the School Board of the City of Norfolk has satisfied its affirmative duty to desegregate, that racial discrimination through official action has been eliminated from the system, and that the Norfolk School System is now "unitary," the Court doth accordingly

ORDER AND DECREE that this action is hereby dismissed, with leave to any party to reinstate this action for good cause shown.

/s/ JOHN A. MacKENZIE
United States District Judge

Dated: February 14, 1975

We ask for this:

/s/ Henry L. Marsh, III
Counsel for Plaintiffs

/s/ Allan G. Donn
Counsel for Detendants

No appeal was taken from the order dismissing the case. No legal action was taken with respect to the desegregation of Norfolk's public schools from 1975 until the present action was filed in 1983.

Although no longer under court order, the Norfolk school board continued cross-town busing until 1983. At that time, the board concluded that declining white enrollment figures required that the busing plan be modified to abolish mandatory busing of elementary school students. In its stead, the board adopted a pupil assignment plan based on geographic zones for its elementary schools. The board sought district court approval of its proposed plan by filing a motion to reinstate the Beckett case and by filing a civil action, School Board of the

City of Norfolk v. Bell, et al, No. 83-225-N (E.D. Va. 1983). The Riddick plaintiffs (those presently before the court) thereafter filed this class action suit challenging the proposed pupil assignment plan. The board voluntarily dismissed the Bell case and withdrew its motion in the Beckett case. The issues raised in those proceedings are raised here.

II. Facts

In 1970, the population of Norfolk was 307,951, 70% (215,069) white and 28% (87,261) black. The Norfolk public schools enrolled 56,830 pupils during the 1969-70 school year, 57% (32,586) of those students being white and 43% (24,244) being black.

In 1980, the population of Norfolk had declined more than 11% to 266,979, 61% (162,300) white and 35% (93,987) black.

The public school enrollment, racially and otherwise, had even more drastically changed. By the 1980-81 school year, enrollment had shrunk to 36,643, a 37% drop in overall enrollment. Even more startling, the white enrollment that year was 15,629 or 42.6% of the total school enrollment. Black enrollment (21,014) now comprised 57.4% of the total school enrollment. While the overall percentage of white enrollment had dropped 14.4%, white school enrollment had dropped 52%, although the white population decreased only 24%. By 1983, school enrollment was down to 34,803, 58% (20,191) black and 42% (14,611) white.

Largely because of the drop in overall student enrollment during those years, 17 elementary schools were closed. Most of these schools closed were located in predominantly black neighborhoods.

Since 1971, the school board had used a 70%-30% ratio in assigning students under the busing plan. A school was considered as a racially identifiable black school if its enrollment consisted of more than 70% black students. In 1977, one elementary school was over 70% black. By 1981, seven elementary schools were over 70% black. During this same period, parental involvement, as shown by PTA membership, dropped dramatically, from 15,000-20,000 down to 3,500.

Alarmed about the continued loss of white students from the public school system and the drastic drop in parental involvement, the school board appointed an ad hoc committee in 1981 to examine the feasibility of reducing cross-town busing. The committee members initially were Mrs. Jean Bruce, Mrs. Hortense Wells, Tommy Johnson, Robert Hicks, and John

Foster. It was later expanded to a committee of the whole. The Committee members visited other school systems to study their desegregation programs, including the Shreveport, La. and Richmond, Va. school systems. A task force was appointed to produce data for the committee.[2] The committee communicated with experts in the field for consultation, including Dr. Ron Edwards, Dr. Robert Green, Dr. Sarah Lightfoot, and Dr. David Armor. Three members of the ad hoc committee favored a proposal ending busing of elementary school students. Dr. Foster opposed the change.

The board engaged Dr. Armor to prepare a report on the problems of continued integration of Norfolk's schools. Armor concluded that mandatory

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[2] Its members included Dr. Jane Carter, Dr. John McLaulin, and Dr. Aaron Gay.

busing had led to significant white flight and that if busing continued, the Norfolk school system would be 75% black by 1987. At the point of 75% black, no matter in which year it occurred, of course the average black child could not expect to be educated in a desegregated school according to the 70/30 definition used and which Armor stated was consistent with most definitions of segregation. Busing, he said, had aided the obtainment of racial balance but such balance was of little aid as the system was resegregating with the rapid loss of white students. He concluded that under such circumstances busing did not significantly aid black academic achievement and that white student enrollment would stabilize if busing were eliminated.

The board held a series of public hearings to present the new pupil assignment plan.[3] Groups both opposed to and supportive of the new plan presented their views at these hearings. Supporters of the plan were concerned with the lengthy transportation of their children, with problems inherent with having their children in schools far from their homes, with lack of parental involvement in these distant schools and with a general feeling that busing was not working. Those opposed to changing the busing plan expressed concerns over the number of schools that would become almost completely black, the adverse effects of such separation of the races, fear that

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[3] An alternate plan, Plan II, was also presented at these hearings. That plan provided for changing but not eliminating busing but did not meet with public support.

the segregation of the past was returning and concern that busing was needed to guarantee equal allocation of both material and human resources.

III. The Proposed Plan

On February 2, 1983, the Norfolk school board adopted the "Proposal For a Voluntary Stably Desegregated School System" by a vote of 5-2.[4] Under the plan, cross-town busing of elementary school students was eliminated.[5] All of the ele-

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[4] Those school board members in favor of the new plan included Thomas Johnson (white), Jean Bruce (white), Cynthia Heide (white), Mrs. Hortense Wells (black), and Robert Hicks (white). Those opposed were Rev. John Foster (black) and Dr. Lucy Wilson (black).

[5] Of thirty-seven elementary schools at the time of trial, there were twenty-two elementary schools attended by students that were bused. One of those, Ghent Elementary School, offered an open classroom program and accepted students from anywhere in the city. The remaining fourteen schools were single attendance zone schools whose students were not bused.

mentary schools became single attendance zone schools (neighborhood schools). Those single attendance zones were gerrymandered so as to achieve maximum racial integration.[6] Students attending any certain elementary school were fed into a certain one of eight junior high schools. Under this feeder plan, all the junior high schools were fully integrated racially. The maximum black/white ratio was 72/28, and the minimum 56/44.

Under the plan, twelve of Norfolk's thirty-six elementary schools will be 70% or more black, compared to four under the busing plan presently in effect. Of those

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[6] Plaintiffs do not challenge the method by which the zones were drawn, or the zones themselves, but instead challenge the plan as a whole.

twelve schools, ten will be 95% or more black. Six schools will become 70% or more white.[7]

School	Projected Assignment	% White	% Minority
Bay View	710	84	16
Bowling Pk.	589	1	99
Calcott	563	61	39
Camp Allen	689	62	38
Chesterfield	572	1	99
Coleman Place	970	47	53
Crossroads	714	37	63
Diggs Pk.	381	2	98
Fairlawn	282	73	27
Granby El.	674	44	56
Ingleside	665	38	62
Jacox	769	1	99
Larchmont	685	52	48
Larrymore	768	31	69
Lindenwood	492	21	79
Little Cr.El&Pri	1037	75	25
Meadowbrook	512	61	39
Monroe	831	0	100
Norview	602	32	68
Oakwood	415	35	65
Oceanair	672	71	29
Oceanview	586	78	22
Poplar Halls	388	43	57
Roberts Pk.	401	0	100
St. Helena	355	2	98
Sewells Pt.	664	64	36
Sherwood For.	627	70	30
Suburban Pk.	539	55	45
Tarrallton	548	48	52
Taylor	487	54	46
Tidewater Pk.	276	2	98
Tucker	312	3	97

The plan contains a majority-minority transfer option, described in Swann, p. 26, as a "useful part of every desegregation plan." Under this option, any student assigned to attend a school at which his race constitutes 70% or more of the student body can transfer to a school where his race constitutes less than 50% of the students. The plan provides for free transportation for those students choosing such a transfer. The school board estimates that 10-15% of eligible students would take advantage of the M/M transfer the first years. Five year projections show as many as 40% of the students may opt for M/M transfers. If 20% of those eligible black students

Willard	802	26	74
Willoughby	558	65	35
Young Pk.	510	1	99
Ghent	600	(open classroom program)	

opt for M/M transfer, only one school would remain more than 70% white. Some of the ten schools with 95% or more black pupils would have smaller percentages of black students but all would yet be above 95%.

The plan also provides for multi-cultural programs to expose students in racially isolated elementary schools to students of other races. A parental involvement program is also included.

A Plan II was drawn up by Dr. John Foster which reduced the length of bus rides for elementary students but increased the number of students that would be bused. No school would have been less than 25% of any one race. Plan II would have required the redrawing of all of the attendance zones in the school system. That plan was also presented at the public hearings. No support was ex-

pressed for Plan II at those hearings, and the plan was not adopted by the board. Plaintiffs do not here seek an adoption of Plan II in lieu of the plan adopted: they seek a return to the original busing plan.

IV. District Court Opinion

On July 9, 1984, the district court upheld the constitutionality of Norfolk's proposed plan for elementary school assignments. As a preliminary matter, the court held that its 1975 ruling that Norfolk's school system was unitary was fully supported by the record and remained in effect at the time of this suit. In so concluding, the court rejected plaintiffs' argument that the 1975 order was merely a consent decree and therefore had no effect upon these plaintiffs.

The court held that the 1975 order had the effect of placing the burden of proof on the plaintiffs instead of the

defendant school board. The burden was on the plaintiffs to show that the proposed plan was adopted by the board with an intent to discriminate on the basis of race. Upon entry of the 1975 order, the court reasoned, the Norfolk school board had discharged its affirmative duty to desegregate its schools. Thus, as of the 1975 order, the school board was no longer operating a de jure dual school system with a concomitant duty to desegregate as required by Brown and later cases. Because no de jure discrimination was present, the plaintiffs were required to show that the school board acted with an intent to discriminate as required by Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), and Washington v. Davis, 426 U.S. 229 (1976).

Finally, the district court found that the plaintiffs had not satisfied their burden of proving discriminatory intent. In reaching that conclusion, the court reviewed the six aspects of public education which must be free from racial discrimination before a system can become unitary: faculty, staff, transportation practices, extracurricular activities, facilities and pupil assignment. Green v. County School Board, 391 U.S. 430, 435 (1968).

There follows, briefly stated, the district court's findings of fact and conclusions of law in its analysis of that question.

Norfolk's school board was racially mixed, composed of four white and three black members. The superintendent of the schools, Dr. Gene R. Carter, was black. Two of the three Regional Assistant

Superintendents were black. The faculty was 56% white and 44% black. Black personnel comprised 52% of the total. Such data reflected that the faculty and staff were fully integrated. Relying on this, the district court rejected plaintiffs' allegation that school resources would inequitably be distributed with predominantly white schools receiving a greater percentage of these resources. In addition, the court noted the new plan itself required periodic judicial review of the school board's allocation of educational resources.

The court found credible the testimony of expert witnesses that Norfolk would continue to lose white students because of busing and that over a period of time the school system would become predominantly black. Norfolk's school system might well become 90% black as are

systems in cities such as Baltimore and Washington, D.C., or 86% black as in Richmond, resulting in resegregation regardless of busing and pupil assignment plans. The court found that Norfolk had lost between 6000-8000 white students because of busing.[8] As a result of this white flight, Norfolk's schools were resegregating under the busing plan.

The district court recognized that white flight cannot be used as a reason for failure to dismantle a dual school system. United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972). The consideration of white flight in devising a voluntary plan to improve the racial balance of the schools was

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[8] Students were lost from the public schools in two ways, those who left the schools after once being enrolled and those who settled in communities surrounding Norfolk instead of Norfolk itself.

proper however. Higgins v. Board of Education of City of Grand Rapids, 508 F.2d 779 (6th Cir. 1974). It found the board's consideration of white flight was proper because it was voluntarily attempting to keep its schools stably integrated. It was under no affirmative court order to desegregate at the time. Such consideration was not a pretext for racial discrimination. In sum, the district court found that keeping white students in the schools was necessary to insure a desegregated education, and, since the white students had been lost because of busing, the board was justified in reducing the busing in an effort to keep white students.

Likewise, the court found as a fact and credited the board's second reason for adoption of the proposed plan, that of seeking an increase in the level of

parental involvement. All the evidence at trial, both from plaintiffs and the board, indicated that parental involvement at the elementary level was essential to the well-being of the school system. Because of busing, however, parental involvement through the vehicle of the PTA had been virtually destroyed. PTA enrollment had dropped from approximately 15,000-20,000 members to 3,500 members. During this period of declining enrollment, the board had tried to bolster membership by various means, including providing free transportation to parents to enable them to attend meetings at their children's school. The board's efforts were unsuccessful. Evidence at trial convinced the court that parental involvement declined as a result of their children attending schools across town instead of close to their home with resulting easy

access of parents to the school. The proposed plan offered by the board represented a reasonable proposal to try to solve the dilemma of declining parental involvement.

Based upon the above reasoning and fact findings, the court rejected the plaintiffs' contention that the proposed plan was adopted for the purpose of racial discrimination. It found that neither the board's purpose of trying to create a stably integrated student body nor its effort to increase necessary parental involvement was pretextual. Therefore, the district court found that plaintiffs had not carried their burden of proving intent to discriminate on the part of the school board.

The court also rejected the plaintiffs' claim that discriminatory intent can be inferred from the procedure used by

the board in considering and adopting the proposed plan. It found that the board had followed a thorough and reasonable procedure, including creating a special committee, hiring experts and holding six public hearings throughout the community. It also found no basis in fact for the plaintiffs' claim that the board had acted in concert with local housing authority officials to determine the location of housing projects[9] and thereby determine the location of black elementary schools.

Plaintiffs appeal the district court's order rejecting their claim of intentional discrimination by the school board in adopting the proposed plan for

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[9] Twenty-five percent of Norfolk's black families live in public or subsidized housing projects. These twenty-two projects are occupied almost exclusively by black residents

neighborhood elementary schools in Norfolk. Specifically, they claim error in (1) the district court's holding that the 1975 order declaring the Norfolk school system to be unitary remains effective and applicable to this lawsuit; (2) the district court's conclusion that Norfolk's school system is in fact unitary: (3) the court's conclusion that the burden of proof in this action is upon the plaintiffs to prove intent to discriminate by the school board; and (4) the court's holding that the school board's actions were not motivated by racial criteria in violation of the Fourteenth Amendment. We will consider these arguments in turn.

V. Effect of 1975 Order

In 1975, the district court in Beckett found that the Norfolk school system had "satisfied its affirmative

duty to desegregate, that racial discrimination through official action [had] been eliminated from the system and that the Norfolk School System [was] 'unitary'." That holding marked the culmination of almost two decades of desegregation litigation in Norfolk. The Beckett litigation was effectively completed in 1971 when a busing order was entered. Following its entry, the district court monitored the school system for four years and became satisfied that the system had ridded itself of racial discrimination. Being satisfied that the plan had succeeded in eradicating segregation, the court dismissed the suit.

Plaintiffs contend that the 1975 order is no more than a consent order entered by the parties and therefore is not binding upon them. While the plaintiffs are correct in stating that, as

a general rule, all consent orders do not necessarily have collateral estoppel effect, United States v. International Bldg. Co., 345 U.S. 502 (1953), we believe that the 1975 order was not a compromise judgment.[10] Id. at 506. As previously noted, that order culminated a lengthy and hotly contested lawsuit which resulted in the ending of segregated schools in Norfolk. The court monitored the desegregation plan for several years and, after finding that all of the claims raised in the complaint had been disposed of, dismissed the case. Because the court made findings on the merits of the plaintiffs' claims for relief, the order is not a consent order in settlement of a suit but is an order on the merits of the same. The

[10] See generally 1B Moore's Fed. Practice ¶ .444[3] for a discussion of the collateral estoppel effect of consent orders.

fact that the parties agreed to the order does not alter that conclusion. International Bldg. Co. supra, at 506. Unlike an order compromising a claim by agreement, the district court in the order now contested ruled on the questions of law and fact in dispute. Because the order represents the court's findings on the issues raised and not a compromise entered into by the parties, the consent order exception to application of collateral estoppel principles is inapplicable here.

Such a conclusion is consistent with the duty placed upon district courts in disposing of school desegregation cases. A district court is under an obligation to retain Jurisdiction over the school system under a proposed integration plan to determine its effectiveness in achieving desegregation. Swann,

supra, 402 U.S. at 21; Green, supra, 391 U.S. at 439; Raney v. Board of Education, 391 U.S. 443, 449 (1968). It is required to retain jurisdiction until it determines that the school system has become unitary. United States v. Texas Ed. Agency, 647 F.2d 504, 508 (5th Cir. 1981). Such a determination should only occur after the district court has retained Jurisdiction over the school system to make certain that "it is operated in a constitutionally permissible fashion so that the goal of a desegregated, nonracially operated school system is rapidly and finally achieved." Raney, supra, 391 U.S. at 449; Felder v. Harnet Co. Board of Education, 409 F.2d 1070, 1075 (4th Cir. 1969). The district court followed the monitoring procedure as it was required to do. It did not end the litigation until it was satisfied that the

school system was free from racial segregation. Such active participation by the court belies any argument that the 1975 order is anything less than a judgment on the merits.

Plaintiffs next contend that the 1975 order should be given no effect here because the United States, a party to the prior action, was not given notice of, nor consented to, that order. Plaintiffs have no standing to raise such a claim, especially since the United States does not challenge the 1975 order. See generally the government's brief 12-15.

We likewise reject plaintiffs' argument that the 1975 order is not to be given effect here because it was not a final order. That contention derives from language in the order that the action "is dismissed, with leave to any party to reinstate this action for good

cause shown." If we consider that only final orders are to be given preclusive effect, Kasper Wire Works, Inc. v. Leco Engineering & Mach., 575 F.2d 530, 537-8 (5th Cir. 1978),[11] we find no violation of that maxim here. The 1975 order concluded a complex legal battle of almost twenty years' duration in which all parties had ample opportunity to be heard. That order could have been appealed under 28 U.S.C. § 1291 if the parties so chose. They did not. The order finally disposed of all remaining issues in the litigation, and it could have been appealed. As such, preclusion principles attach.

The fact that the district court gave the parties an opportunity to reinstate the cause upon the docket with a showing of good cause does not alter our

[11] See 18, Wright, Miller & Cooper Federal Practice and Procedure, § 4432.

holding. That language is not dissimilar to the language in Fed. R. Civ. Pro. 60(b) which allows parties to seek relief from a judgment under certain prescribed circumstances. Rule 60(b) specifically provides, however, that such opportunity to seek relief from judgment does not affect the finality of an order. We believe that the same reasoning should apply here.

Plaintiffs further argue that the 1975 order should not be binding on them because the district court did not comply with Fed. R. Civ. Pro. 23(e) by giving notice to members of the class prior to dismissal or compromise of the class action. We have found that the 1975 order is not a voluntary dismissal or compromise but instead represents an adjudication on the merits. Thus, such an order is not subject to 23(e)'s notice

requirements. See Shelton v. Pargo, Inc., 582 F.2d 1298, 1300 n. 1 (4th Cir. 1978); Hutchinson v. Fidelity Inv. Assoc., 106 F.2d 431 (4th Cir. 1939); Wright & Miller, Federal Practice and Procedure, 1972, § 1797, p. 235-236.

Once a court decides an issue of law or fact necessary to its judgment, that decision can be binding upon a party to it if the party was given a "full and fair opportunity to litigate [the] issue in the earlier case." Allen v. McCurry, 449 U.S. 90, 94-5 (1980). The Court has summarized its thoughts in Montana v. United States, 440 U.S. 147, 153-4 (1979):

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies....' South-

> ern Pacific R. Co. v. United States, 168 U.S. 1, 48-49 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. (Citations omitted) Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. (Citation omitted) Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within the jurisdictions. (Citation omitted) To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (Footnote omitted)

The principles of collateral estoppel or issue preclusion are applicable to school desegregation cases. Los Angeles Branch NAACP v. L.A. Unified School Dist., 750 F.2d 731 (9th Cir. 1985); Bronson v.

Board of Education of City School Dist., 687 F.2d 836 (6th Cir. 1982); 525 F.2d 344 (6th Cir. 1975).

Plaintiffs' final claim on this point is that they have not had a full and fair opportunity to litigate the unitary finding. The Beckett plaintiff class represented black school students in the Norfolk school system. It litigated for almost twenty years. Norfolk's black school children are the plaintiffs here. While the actual makeup of class members may be different because of the passage of time (as it is bound to have been at the beginning and ending of Beckett), we believe that the two classes are in sufficient privity for the principles of collateral estoppel or issue preclusion to apply. Bell v. Board of Educ. Akron Public Schools, 683 F.2d 963 (6th Cir. 1982); Bronson, supra, 525 F.2d at

349. The Beckett plaintiffs had a full and fair opportunity to contest the district court's 1975 unitary finding. These plaintiffs cannot now relitigate that issue here. Los Angeles Branch NAACP, supra; Bronson, supra: see Azalea Drive-In Theatre, Inc. v. Hanft, 540 F.2d 713 (4th Cir. 1976), cert. den. 430 U.S. 941 (1977).

Mindful of the Court's admonition in Montana, p. 163, that "[un]reflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law when responsiveness to changing patterns of conduct or social mores is critical," we nevertheless conclude that the district court did not err in finding that its 1975 order was binding upon these parties.

VI. Norfolk as a Unitary School System

The question of whether the Norfolk school system was unitary at the time of the trial was explored at trial, perhaps with the intent to show that the school system was not unitary in 1983 and 1984 although it might have been in 1975.

In Green v. County School Board, 391 U.S. 430 (1968), the Court for the first time spoke of the goal of school desegregation as the transition of a dual school system into a unitary one. The Green plaintiffs brought suit challenging the freedom of choice plan initiated in New Kent County, Virginia.[12] New Kent County is a rural county in eastern Virginia. Its school system consisted of two schools, a white school serving grades 1-12 and a

[12] The freedom of choice plan allowed the student to choose the public school he wished to attend, with minor qualifications not pertinent here.

black school serving the same grades. School segregation had existed, of course, in all parts of Virginia prior to Brown I, under both constitutional and statutory command. When the Green complaint was filed, pupil assignment in the county was governed by a pupil placement board created by state law. Green at 432-3. Students were generally reassigned each school year to the school they had attended the prior year unless they sought reassignment by the placement board. After the Green suit was filed, the school board adopted a freedom of choice plan to desegregate their two schools.

In finding the freedom of choice plan constitutionally inadequate as a remedy under the facts of that case, the Court first concluded that the county had established and operated a school system under state law like that forbidden by Brown - a

"dual system, part 'white' and part 'Negro'." Green, supra, 391 U.S. at 435. Additionally, the county had delayed the dismantling of that dual system, and the freedom of choice plan had induced only 15% of Negro students to attend the formerly all white school. No white student had attended the all Negro school. Within that factual setting, the freedom of choice plan did not provide any meaningful assurance that the dual system would be promptly dismantled. The facts showed otherwise because, after three years of operation under the freedom of choice plan, 85% of the county's black students still attended all black schools.

Under the mandate of Brown "[s]chool boards ... then operating state-compelled dual systems were ... clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a

unitary system in which racial discrimination would be eliminated root and branch." Green, supra, 391 U.S. at 437-8. All aspects of public education must be freed from the vestiges of state sanctioned racial segregation before a school system becomes unitary. Integration must occur in the system's faculty, staff, transportation practices, extracurricular activities, facilities and pupil assignment. Green, supra, 391 U.S. at 435.

As we have previously stated, the mere implementation of a desegregation plan does not convert a dual system into a unitary one. United States v. Texas Ed. Agency, supra, 647 F.2d at 508.

The district court here found that its 1975 finding that the Norfolk school system had achieved a unitary status was a correct one and that the school system retained its unitary status until the pre-

sent. It found that "the Norfolk School Board is an integrated body, the Norfolk school administration is racially balanced, the racial composition of the faculty and staff is mixed, and the overwhelming majority of school children, of both races, on the elementary, junior and senior high school levels, attend schools whose student bodies are racially mixed. In addition, there has been no contention, nor could there be one, that the extracurricular activities, transportation network and school facilities are operated in a dual fashion. Finally ... there has been no challenge to any of the Board's actions in the Beckett litigation since some time before the 1975 order was entered."

Our review of the district court's findings that the school system is unitary is under Fed. R. Civ. Pro. 52(a)'s re-

quirement that findings of fact be set aside only if clearly erroneous. Vaughns v. Board of Education of Prince George's Co., 758 F.2d 983 (4th Cir. 1985). Factual findings by a district court in school desegregation cases, especially where the presiding judicial officer has lived with the case for many years, are entitled to great deference on review. Vaughns, supra, at 990; see Goldsboro City Board of Education v. Wayne Co. Board of Education, 745 F.2d 324, 327 (4th Cir. 1984); Columbus Board of Education v. Penick, 443 U.S. 449, 457 n. 6 (1979).

Under the clearly erroneous standard, a reviewing court may not reverse the findings of the trial court simply because it would have decided the case differently. "If the district court's account of the evidence is plausible in light of the

record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, N.C., ___ U.S. ____, 53 U.S.L.W. 4314, 4317 (1985). This rule applies even when the district court's findings rest upon physical or documentary evidence. We are cautioned that our appellate role is violated if we seek to decide the matter anew.

We cannot say that the trial court's finding that the school system is unitary is clearly erroneous. The evidence in the record supports the court's conclusion that the faculty and staff are fully integrated. Three of the seven board members

are black. The superintendent and two of the three regional assistant superintendents are black. No serious question is raised that the faculty and staff are still segregated, and we agree that no such segregation exists.

The district court found that the overwhelming majority of Norfolk's students attend racially mixed schools. The statistics in the record bear out that conclusion. As a general rule, the school board has been able to keep its elementary schools within the 70%-30% guideline adopted in the early 1970's.[13] We agree with the district court's finding that Norfolk's students are attending integrated schools. No one argues that the school

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[13] Following the district court's order, the school board defined racially identifiable schools as those with fewer than 30% or more than 70% minority or non-minority students.

facilities, extracurricular activities or transportation system are operated in a dual manner. We note again that the busing of students continues in grades 7-12.

The district court reviewed all six factors set out in Green and found that Norfolk's school system had remained unitary since 1975. There is substantial evidence in the record to support such a finding. We therefore affirm its holding.

VII. Effect of the Unitary Finding

This brings us to the principal issue in this appeal: What effect does the finding that Norfolk's school system is unitary have upon the prosecution of a constitutional challenge to the proposed neighborhood school assignment plan? What procedure governs a challenge to a student assignment plan for a school district that historically practiced de jure

segregation but had obtained a valid judicial order that it has ridded itself of all vestiges of that racial discrimination? A related inquiry must be to what extent and for how long must a previously discriminating school system submit to judicial control. Does judicial involvement end when unitary status is achieved or does judicial involvement continue in perpetuity to prevent resegregation absent a showing of intent to discriminate?[14]

The district court concluded that its finding that the Norfolk school system is unitary had the effect of shift-

[14] We decide the case under the de facto/de jure distinction which we think is the law. See, e.g., Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). One respected commentator, however, has predicted the distinction could not survive. See Bickel, Untangling the Busing Snarl, The New Republic, Sept. 23, 1972. The separate opinions of Justices Douglas and Powell in Keyes take the position that it should not.

ing the burden of proof from the defendant school board to the plaintiffs. It held that plaintiffs had the burden of proving that the school board implemented the contested pupil assignment plan with an intent to discriminate on the basis of race.

Plaintiffs disagree with the allocation of the burden of proof by the district court. They claim that the burden of proof remains on the school board to prove that implementation of the new assignment plan will not perpetuate the vestiges of the past de jure dual system. While we find no case which has addressed the issue under a fact situation the same as present here, we agree with the district court's allocation of the burden of proof.

Since 1954, de jure racial segregation in public schools has been unlawful as in violation of the Fourteenth Amendment to

the Constitution. Brown, supra. Such discriminating schools were placed under an "affirmative duty to 'effectuate a transition to a racially non-discriminatory school system'." Keyes v. School Dist. No. 1, Denver, Col., 413 U.S.189, 200 (1973), quoting Brown v. Board of Education, 349 U.S. 294, 301 (1955) (Brown II). State sanctioned dual school systems must take whatever steps are necessary to completely eliminate racial discrimination. Dayton Board of Ed. v. Brinkman, 443 U.S. 526, 537-8 (1979); (Dayton II); Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 458-59 (1979); Swann, supra, 402 U.S. at 15; Green, supra, 391 US. at 437-8. Each instance of a refusal or failure to perform its duty to desegregate constitutes a constitutional violation by the school board. Columbus Bd. of Ed., supra, at 459, citing other cases.

Once a plaintiff shows that segregation exists in a school system that was authorized or required by state law at the time Brown was decided, it follows as a matter of course that the school authorities have a duty to eliminate such segregation. Keyes, supra, 413 U.S. at 200-3. The board cannot satisfy its duty by merely abandoning its prior discriminatory purpose. Nor can it take any action that would impede the process of converting to a unitary system. Dayton II, supra, 443 U.S. at 538. The board is under a heavy burden of showing that any action it takes that continues the effects of the illegal dual system serves a legitimate end. Id. The burden remains upon the school board to dismantle the segregated system and convert to a "unitary system in

which racial discrimination [is] eliminated root and branch." Green, supra, 391 U.S. at 438.

Rescission of a voluntary desegregation plan itself may be found to be an act of segregation for a school board which has been found to have practiced de jure segregation and has not completed the transition from a dual to a unitary school system. NAACP v. Lansing Bd. of Ed., 559 F.2d 1042 (6th Cir.), cert. den. 434 U.S. 997 (1977). In a school system that has not become unitary, the school board is not barred from ever changing a desegregation plan. In such a situation, however, the board must show that the proposed changes are consistent with its continuing affirmative duty to eliminate discrimination. Clark v. Board of Educ. of Little Rock School Dist., 705 F.2d 265 (8th Cir. 1983).

The continued existence of a small number of one race schools within such a school district does not establish in and of itself a constitutional violation. Swann, supra, 402 U.S. at 26: Clark, supra, 705 F.2d at 272. The burden is upon the school board, however, to show that the existence of such schools are genuinely nondiscriminatory and not vestiges of past segregation. Swann, supra, 402 U.S. at 26; Davis v. E. Baton Rouge Parish School Bd., 721 F.2d 1425, 1434 (5th Cir. 1983).

A district court is under a duty to enter a desegregation order that will go as far as possible toward eliminating segregation. Green, supra, 391 U.S. at 438 n. 4. The court's equitable powers in such decrees are broad indeed, but they are not plenary. They are limited to those cases in which a constitutional vio-

lation has occurred, either where a de jure segregated system exists, where intent to discriminate is presumed, or where a de facto segregated system exists and intent to discriminate has been proven. In situations in which a school board has defaulted on its obligations, the court can use its broad powers to fashion a remedy in order to assure a unitary system. Swann, supra, 402 U.S. at 16.

Once such a remedy is fashioned, the district court retains jurisdiction until it is clear that the unlawful segregation has been completely eliminated. But once the goal of a unitary school system is achieved, the district court's role ends. See, generally, Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 (1976). Foreseeing such a time, the Swann Court stated:

At some point these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions in Green and Alexander.

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Swann, supra, 402 U.S. at 31-32.

In Pasadena. supra, 427 U.S. 424, the Court again recognized that the right of the federal courts must end when the objective sought has been achieved. A court ordered desegregation plan was adopted in 1970 which provided that students must be assigned in such a manner so that no school in the district would be comprised of "a majority of any minority students." Id. at 428. The district court retained jurisdiction in the case. Neither party appealed, and the plan became effective that same calendar year.

Four years later, the school board returned to court, seeking, among other things, relief from the no "majority of any minority students" provision in the form of a lifting of the court's injunction. The district court refused to grant the school board relief from its

order primarily because it perceived that the school board had not properly complied with its order after the first year it was in force. The school board had adjusted attendance zones in 1970 to comply with the order but had not readjusted each year thereafter. As a result, schools slipped out of literal compliance with the not to exceed 50% mandate by the next school year. By the time of the district court hearing, five of the system's 32 schools no longer met the less than 50% rule. Id. at 431. The district court made clear that it expected the school board to readjust student attendance figures yearly to comply with the court's ruling. Id. at 433. The court of appeals found that the district court had not abused its discretion in imposing such an annual requirement.

The Supreme Court disagreed. Initially, it found that the district court was impermissibly requiring a "particular degree of racial balance or mixing" which Swann expressly condemned. Id. at 434. While such a racial balance can be a starting point on the road to complete desegregation, it reasoned, it can never be an inflexible requirement.

Next, the Court rejected the district court's authority to impose such a requirement absent a showing that the defendant school board was responsible for the intervening changes in the racial composition of the schools. The Court relied approvingly on the cautionary language of Swann that "'it must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school system. [Citation omitted] These limits are in part tied to the necessity

of establishing that school authorities have in some manner caused unconstitutional segregation, for '[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis'." Id. at 434.

The district court had found a constitutional violation in 1970 and thus had the initial authority to cause the reassignment of students on the basis of race. But once Pasadena adopted a racially neutral system, no further constitutional violation could be found unless by acts attributable to the school board. At that point, the district court exceeded its authority by requiring the readjustment of attendance zones absent such a constitutional violation. Because the school board was not responsible for the demographic shifts in the population

which caused the schools to slip out of compliance, it was under no duty to adjust school attendance figures to reflect those changes. The Court concluded that "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance zones." Id. at 436-7.

We have only recently examined both Pasadena and Swann and concluded that a district court's power to effect additional remedial orders is limited. "Once a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts." Vaughns,

supra, at 988. Other courts have reached the same conclusion. Davis, supra, 721 F.2d at 1435 ("Changes in neighborhood ethnicity taking place after school officials have transformed their system into a unitary one need not be remedied, of course, for school officials are under no duty to adjust for the purely private acts of those who chose to vote with their feet."); Ross v. Houston Independent School Dist., 699 F.2d 218, 225 (5th Cir. 1983) ("When state officials have not only made good faith efforts to eliminate the vestiges of segregation, but have actually achieved a school system clean of every residue of past official discrimination, immutable geographic factors and post-demographic changes that prevent the homogenation of all student bodies do not bar judicial recognition that the school system is

unitary.") But see United States v. Hendry Co. Sch. Dist., 504 F.2d 550, 554 (5th Cir. 1974) ("We cannot tolerate resegregation of a former dual school system, and the school board of such a system must demonstrate that the new construction will not tend to promote such a relapse." The decision was prior to Pasadena, however.)

We agree with the district court that Swann and the cases that follow, both in the Supreme Court and in the courts of appeals, require a plaintiff to prove discriminatory intent on the part of the school board of a unitary school system.

We think the rationale of these cases is applicable here. We recognize some factual differences between those cases, where factors outside the school board's control such as demographic changes cause the racial composition of schools to

change, and the case we consider today, where an act of the school board in changing a part of a desegregation plan results in the shifting racial composition of the schools. We do not take lightly this factual distinction but conclude that the plaintiffs must be required to carry the burden of proving discriminatory intent.

While we find no case decided in the same situation as that before us, the Ninth Circuit has alluded to markedly similar facts in holding that the district court must relinquish jurisdiction over the Pasadena case following remand. Spangler v. Pasadena, 611 F.2d 1239 (9th Cir. 1979). Following the Supreme Court decision in Pasadena, the school board sought to have the district court dissolve the injunction entered in the case and

relinquish jurisdiction.[15] The district court refused to end its oversight over the Pasadena school system.

The court of appeals concluded that the district court's refusal was based upon a belief that "unless it retained jurisdiction, the Board might at some future date, by action or inaction, cause or suffer to occur some degree of avoidable, 'resegregation.'" Spangler, supra, at 1240.[16] In reversing that decision, the Ninth Circuit relied upon the three factors set out in Millikin v. Bradley, 433 U.S. 267, 280-1 (1977) (Millikin II), in ascertaining the propriety of the remedial

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[15] The district court had previously refused such a request, which refusal was affirmed on appeal. Spangler, supra, 519 F.2d 430, rev'd on other grounds, 427 U.S. 424.

[16] Judges Goodwin and Kennedy delivered separate opinions. Judge Anderson concurred in the reasoning and result of both, thus both are opinions of the court.

measures to be used following a finding of de jure school segregation. First, the court must consider the nature and scope of the constitutional violation; second, the remedial objective sought is to be the restoration of the victims of discrimination to the position they would have occupied absent the constitutional violation: and, third, consideration must be given to the interests of allowing state and local authorities to manage their own affairs. Finding all three factors were met following nine years of court supervision, the Ninth Circuit concluded that the time had come to end court intervention in Pasadena's school system. 611 F.2d at 1240-1241 (Judge Goodwin).

Judge Kennedy's opinion set out in more detail the basis for the district court's concerns over resegregation. The district court feared that once jurisdic-

tion terminated, the school board planned to return to a neighborhood school plan as had existed before the 1970 court ordered desegregation plan. If the neighborhood plan were readopted, the racial composition of Pasadena's schools would revert to approximately what it was before the desegregation plan. Spangler, supra, at 1243. School board members had made it known publicly that they endorsed return to a neighborhood school plan. It was upon these facts that the district court based its finding of continuing intentional discrimination by the school board. Spangler, supra, at 1244.

The court found (Judge Kennedy) that the district court had committed errors of law in reaching that conclusion. Initially, the district court appeared to be requiring a certain racial balance to be maintained in Pasadena's schools, a con-

cept disapproved by the Supreme Court. It said "[t]he Supreme Court has emphasized that when a large percentage of minority students in a neighborhood school results from housing patterns for which school authorities are not responsible, the school board may not be charged with unconstitutional discrimination if a racially neutral assignment method is adopted.... From the standpoint of racial balance in pupil assignments, compliance with the [court's desegregation plan] for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies." Spangler, supra, at 1244.

It rejected the district court's justification that continuing jurisdiction was required to prevent readoption of a neighborhood school plan with its concomi-

tant change in racial balance, and found that adoption of a neighborhood plan was not necessarily synonymous with an intent to discriminate. "Adopting a student assignment method different from the [court's plan] may have the foreseeable effect of increasing racial imbalance in the Pasadena schools. This fact is relevant in determining whether a plan was adopted as a result of invidious intent, but other factors must also be examined.... The fact that the Board has explored assignment alternatives which may increase racial imbalance provides little support for the conclusion ... that the proposal, if adopted, would result from constitutionally infirm motives." Spangler, supra, at 1245.

Both opinions agreed that if a new student assignment plan were adopted in Pasadena with the intent to discriminate, a new suit could be brought to challenge such a plan. In the absence of such intentional acts, authority to run the school system should be returned to the school board. Spangler, 611 F.2d at 1241, 1242, 1247.

The 1975 order of the district court in Norfolk returned control of the city's schools to the school board by its finding that the school system was unitary. Nothing in the record about events between then and the proposal of the pupil assignment plan here in question has changed that situation. The Norfolk board recently took the very action the court considered to be contemplated by the Pasadena school board. While the Ninth Circuit had only the question of termina-

tion of district court jurisdiction before it, that court made clear that following such relinquishment, a plaintiff must prove that the school board acted with an intent to discriminate in adopting a new student assignment plan. We find that reasoning persuasive and consistent with our reasoning in Vaughns. We hold that the burden of proving discriminatory intent attaches to a plaintiff once a de jure segregated school system has been found to be unitary.

Once a constitutional violation has been remedied, any further judicial action regarding student assignments without a new showing of discriminatory intent would amount to the setting of racial quotas, which have been consistently condemned by the Court in the context of school integration absent a need to remedy an unlawful condition. Pasa-

dena, supra, 427 U.S. at 433-4; Millikin v. Bradley, 418 U. S. 717, 740-41 (1974) (Millikin I); Swann, supra, 402 U.S. at 24-5. Racial quotas are to be used as a starting point in remedying de jure segregation but not as an ultimate goal to be continued in perpetuity. Indeed, since almost every action of a school board with respect to pupil assignments in a mixed school system necessarily affects racial balance, if we were to require the Norfolk school board to justify every action it takes that affects the racial balance of its schools, we would make a finding that the school system is unitary virtually meaningless in that context. The 1975 unitary finding marks the end of de jure segregation in the system. Following such a finding, control of the system must be allowed to return to local officials. No one seriously disputes that

public education has traditionally been a local concern. Generally, Millikin I, supra, at 741-2. And the power of the federal courts is not plenary, Swann, p. 16; rather, it depends upon a constitutional violation for its exercise. Pasadena, p. 434.

We reject plaintiffs' argument that the Norfolk school board must continue to justify all of its actions because of the history of segregation. While that history of discrimination cannot and should not be ignored, it "cannot in the manner of original sin, condemn governmental action that is not itself unlawful." City of Mobile v. Bolden, 446 U.S. 55, 74 (1980) (plurality opinion of the Court by Justice Stewart). If the rule were otherwise, virtually every action of the school board with respect to any of its various affairs would be suspect. And, to repeat, we

keep in mind that while the history of discrimination is not dispositive, it is relevant to a court's determination of the school board's intent.

Plaintiffs' reliance on cases such as Columbus Board of Education, supra, 443 U.S. 449; Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II); Keyes, supra, 413 U.S. 189; Swann, supra, 402 U.S.; and Green, supra, 391 U.S. 430, for placing the burden of proof on the school board is misplaced because all of those cases involved state sanctioned discriminating school districts that had not dismantled their dual systems. None had reached the goal of a unitary system as Norfolk has done.

VIII. Plaintiffs' Proof

We next consider whether or not plaintiffs met their burden of proof. Plaintiffs raise errors both of law and

fact in the district court's decision making process. Initially, they claim the district court erred in its approval of the school board's consideration of white flight as one reason for abandonment of busing of elementary school children. We agree with plaintiffs that white flight cannot be used as a justification for failing or refusing to dismantle a dual school system. United States v. Scotland Neck Board of Education, supra, 407 U.S. at 491; Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1972). White flight cannot be used as an excuse to resist or evade a present duty to desegregate. But the Norfolk school board is not operating a dual school system with a present duty to desegregate.

Consideration can be given to the phenomenon of white flight under certain circumstances. As the Sixth Circuit said

in a much quoted opinion "[i]t does not follow that a board must ignore the probability of white flight in attempting to formulate a voluntary plan which would improve the racial balance in the schools without at the same time losing the support and acceptance of the public.... [T]here is a valid distinction between using the defense of white flight as a smokescreen to avoid integration and realistically considering and dealing with the practical problems involved in making voluntary efforts to achieve integration." Higgins, supra, 508 F.2d at 794 (emphasis in the original). The circuits have consistently followed this language and allowed consideration of white flight in the formulation and adoption of integration plans. Lee v. Anniston City School System, 737 F.2d 952, 957 n. 3 (11th Cir. 1984); Liddell v.

State of Mo., 731 F.2d 1294, 1314 (8th Cir. 1984), cert. den. 105 S.Ct. 82; Johnson v. Bd. of Education of City of Chicago, 604 F.2d 504, 516-517 (7th Cir. 1979), vacated on other grounds, 449 U.S. 915 (1980); Parents Assn. of Andrew Jackson High School v. Ambach, 598 F.2d 705, 719-20 (2d Cir. 1979); Stout v. Jefferson Co. Bd. of Ed., 537 F.2d 800, 802 (5th Cir. 1976).

We are of opinion the district court correctly concluded that the school board could legitimately consider the presence of white flight in the pursuit of a voluntary plan to stabilize school integration in Norfolk. We reject plaintiffs' argument that under Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the neighborhood school plan is suspect because its assignments are based upon race. School assign-

ments are based upon the residence of the child, not the race of the child. Plaintiffs present no evidence to support a finding that such a residential classification is a pretext for discrimination based on race. The board assigned students to schools under the new plan solely on the basis of their residence. The only consideration of race involved was an effort on the board's part to gerrymander the school assignment lines to result in the maximum amount of integration possible.

The concept of a neighborhood school system in and of itself is not violative of the Constitution. E.g. Crawford v. Los Angeles Board of Education, 458 U.S. 527, 537 n. 15; Swann, supra, 402 U.S. at 28; Thompson v. Sch. Bd. of City of Newport News, Va., 465 F.2d 83 (4th Cir. 1972). Congress has recognized that

absent discrimination the neighborhood school is the appropriate basis for school assignments. 20 U.S.C. § 1701. Without more, we find nothing constitutionally suspect in the board's preference for a neighborhood school plan.

Whether white flight was present in Norfolk during the relevant times is of course a question of fact. The district court concluded that the evidence revealed a significant amount of white flight from Norfolk's public schools. It found that the system lost 6000-8000 white students because of busing. It further found that because of this exodus of white students, the school system was becoming more and more black and faced the real danger of resegregation. As set forth in Part VI, supra, our review of such factual findings is limited by the clearly erroneous rule. We conclude that there are

sufficient facts in the record to support the district court's finding that white students are leaving the public schools because of busing. The school attendance figures show that white students have gone from a 60% majority to a 42% minority during the decade of the 1970's. By 1982, whites comprised only 40.87% of the total school enrollment.[17] During this same time

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[17] An agreed trial exhibit reveals the following race distributions for public school students, elementary and secondary:

	White	Black	Total	Percent White**
1967-68	33,838	22,546	56,384	60.00
1968-69	33,103	23,023	56,126	59.00
1969-70	32,586	24,244	56,830	57.00
1970-71	30,246	24,425	54,671	55.32
1971-72	25,858	23,930	49,788	51.94
1972-73	24,224	23,578	47,802	50.68
1973-74	24,337	24,714	49,051	49.62
1974-75	23,536	24,451	47,987	49.05
1975-76	22,957	24,420	47,377	48.46
1976-77	22,080	23,976	46,056	47.94
1977-78	20,412	23,282	43,694	46.72
1978-79	18,913	22,686	41,599	45.47
1979-80	16,373	21,395	37,768	43.35
1980-81	15,629	21,014	36,643	42.65
1981-82	14,435	20,885	35,320	40.87

frame, white residents continued to be a majority of the city, falling from 70% to 60%. Clearly, white students are leaving Norfolk's public schools at a much higher rate than they are leaving the city itself.

In addition to students who attend private schools, Norfolk's public schools were losing those students whose families would otherwise move into the city but who chose to move elsewhere to avoid busing. In 1981, for example, Virginia Beach (273,600) and adjoining Norfolk (273,000) were almost the same size but the school system in Virginia Beach (54,776) was more than half again larger than that of Norfolk (35,816). This supports the dis-

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** "White" - includes approximately 3% other minority races.

trict court's finding that a disproportionate number of white families are choosing to move to Virginia Beach.

Dr. Gene Carter, superintendent of the Norfolk school system, testified that students had left the city's public schools because of the mandatory busing plan. Former superintendent, Dr. Albert Ayars, an opponent of the neighborhood plan, nevertheless recognized that some students were leaving the system because of busing.

Plaintiffs argue that the district court's findings are clearly erroneous because their school enrollment figures show that white enrollment in the public schools had stabilized during the early 1980's. These figures set out below[18] reveal that black students com-

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[18] Summary seventh day enrollment
Norfolk Public Schools
1969-1983

prised 42.4% of the student population in 1969. That percentage consistently increased until 1981 when blacks represented 59.2% of the students. In 1982, the black percentage dropped to 58.8% and to 58% the following year. Plaintiffs rely upon this slight increase in white student enrollment over two years

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	W	B	T	%B
1969	32603	24000	56603	42.4
1970	30229	24418	54647	44.7
1971	25836	23921	49757	48.1
1972	24196	23568	47764	49.3
1973	24304	24699	49003	50.4
1974	23504	24442	47946	51.0
1975	22934	24411	47345	51.6
1976	22036	23949	45985	52.1
1977	20365	23251	43616	53.3
1978	18873	22658	41531	54.6
1979	16336	21361	37697	56.7
1980	15600	20995	36595	57.4
1981	14427	20892	35319	59.2
1982*	14521	20735	35256	58.8
1983*	14611	20191	34802	58.0

* 1982 and 1983 figures for whites include "others."

to show that white flight, if ever present, had ended. There is evidence in the record to show that this overall increase in enrollment since 1980 is an aberration due to housing patterns of the Navy during this time. Even absent such an explanation, plaintiffs' enrollment figure differences are not sufficient for us to find that the district court was clearly erroneous. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson, supra, 53 U.S.L.W. at 4317.

It is also claimed that the board's reliance upon a decrease in parental involvement under the busing plan is merely a pretext for discriminating on the basis of race. As we have previously noted, one of the board's concerns in amending its busing plan was

the dramatic drop in parental involvement. No one disputes that such involvement is critical to the well-being of a school system. Former Superintendent Ayars testified that according to a Gallup poll parental involvement was characterized as the "most significant factor in the education of a child." Dr. Ayars himself considered parental involvement "vital" to the health of a school system.

The district court found that Norfolk's public schools were facing a crisis because of the sharp decline in parental involvement. PTA enrollment had dropped from 15,000-20,000 to 3500. Dr. Ayars testified that busing "virtually destroyed" Norfolk's PTA. Efforts to increase parental involvement had been somewhat successful but much more needed to be done to encourage parental interest.

Superintendent Carter testified that many parents had approached him regarding their inability to participate in their children's education under the busing plan. School board members also expressed concern over the lack of parental involvement in the public schools. The district court found that Norfolk's public schools faced a crisis because of the sharp decline in parental involvement during the years of busing and that the new plan offered a reasonable alternative to counter such a decline. We agree. The Norfolk school board was faced with the difficult task of bringing parents back into the school system. These parents stopped participating during the time their children attended schools across town. For many, a lack of transportation to those distant schools could have served as a stumbling block to their participa-

tion. For others, the extra time and expense required to drive across town may have prevented their participation. For still others, the feeling of a lack of community with a cross-town school may have been a factor. Returning these children to schools close to their homes represented a reasonable attempt to once again obtain the involvement of their parents in the school system.

Plaintiffs contend that the district court's findings regarding parental involvement are clearly erroneous because prior attempts by the school board had been successful in obtaining the return of parents to the schools. Former Superintendent Ayars did testify that a past effort had succeeded in obtaining many parents to volunteer to assist in planning school programs. Dr. Ayars admitted, however, that much more

needed to be done to increase the number of parents involved at the elementary school level. Plaintiffs also contend that PTA enrollment figures are an inappropriate method of measuring parental involvement. They offer no alternative method, however. We know of no better gauge of parental interest in a school system than involvement in its PTA program. We find substantial evidence in the record to support the district court's conclusion that the school board's concern over parental involvement was not a pretext for racial discrimination.

Plaintiffs also argue that discriminatory intent can be seen in the board's failure to follow normal procedures in adoption of the proposed plan. These improper procedures include raising the busing issue at a board meeting where such a topic was not on the agenda and when

busing's leading proponent, Dr. John Foster, was absent. Plaintiffs also fault the board for failure to solicit the opinions of Dr. Ayars and for failing to investigate the psychological impact of such a neighborhood plan on black children.

The district court properly found that the decision making procedure followed by the board was reasonable and not indicative of discriminatory intent. The actions taken by the board show nothing short of a reasonable, deliberative process where the citizens of Norfolk were encouraged to speak up and express their views. The board's adoption of the neighborhood plan was not the result of a single meeting behind closed doors. Instead, the board first established a committee to investigate the issue. That committee appointed a task force to obtain

data on the subject. The committee visited several school systems to study their plans. The board solicited the opinions of several experts in the field and retained Dr. Armor for more extensive findings. Six public meetings were held to elicit public comment and criticism. We know of little else the board could have done to make the procedure more fair and open.[19]

We find plaintiffs' remaining claims to be without merit. Plaintiffs fear that school resources will be inequitably distributed under the new plan so that schools with predominantly white students will receive more than their fair share of both material and human resources. As we have pointed out, the school adminis-

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[19] Acting with the utmost caution, the board also sought judicial review of the proposed plan before implementation.

tration is completely integrated. The superintendent and two of the three regional assistant superintendents are black. Blacks comprise 41% of the system's principals and 44% of its teachers. We conclude that plaintiffs' fears are not enough to prove a claim such as this when the decision-makers in the system are themselves integrated. We are additionally reminded that the plan itself provides for judicial review of resource allocation.

Plaintiffs infer discriminatory intent from the board's failure to provide for an alternative plan should the neighborhood plan be unsuccessful at stopping the exodus of white students. We agree with the district court that such a failure would not have an appreciably different effect than continuation of the

busing plan under present trends. In either case, the school system would become predominantly black.

We find no evidence in the record to support the plaintiffs' contention that the school board and the housing authority have acted in concert with the intent to discriminate on the basis of race. As the district court pointed out, Norfolk's housing projects were constructed as a general rule to replace slum areas in the city. Those residents displaced by that demolition were given priority in assignment to the new housing projects. No one disagrees that most of those residents were black, and blacks still represent the vast majority of housing project tenants in Norfolk. This record shows no evidence by either the housing authority

or the school board to assign such housing by race following the culmination of the Beckett[20] case.

We think the district court was correct in its holding that the discriminatory impact alone shown here is not sufficient to make out such a claim. Arlington Heights, supra, 429 U.S. at 266: Washington, supra, 426 U.S. at 242. Such impact is clearly relevant to a determination of intent, however. Columbus Bd. of Ed., supra, 443 U.S. at 464; Dayton II, supra, 443 U.S. at 536 n. 9; Washington, supra, 426 U.S. at 242. In a school desegregation case in which intent is not

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[20] In 1969, the district court rejected such an argument in the Beckett litigation. 302 F.Supp. 18, 27. It concluded that housing patterns resulted from de facto segregation or a desire of blacks to live with blacks and whites to live with whites. This court did not disturb that finding when it considered the matter on appeal and reversed on other grounds. Brewer, supra, 434 F.2d 408.

presumed, a plaintiff must show a discriminatory purpose on the part of the defendant in order to make out a constitutional violation. This purpose, or intent to discriminate, marks the difference between de facto and de jure segregation. The finding that a school population is not homogenous, standing by itself, does not, absent intent, indicate a constitutional violation. Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 413: Swann, supra, 402 U.S. at 17-18. Hence, the presence of one-race schools within a community, standing alone, is not a violation of the Constitution. See Washington, supra, 426 U.S. at 240; Swann, supra, 402 U.S. at 26.

We agree with the district court that the evidence reveals that Norfolk's neighborhood school assignment plan is a reasonable attempt by the school

board to keep as many white students in public education as possible and so achieve a stably integrated school system. It also represents an attempt to improve the quality of the school system by seeking a program to gain greater parental involvement. While the effect of the plan in creating several black schools is disquieting, that fact alone is not sufficient to prove discriminatory intent. While the number of substantially all black schools in the system will not be decreased by the minority to majority option, the number of students attending such schools will be significantly decreased.

Our holding is a limited one, applicable only to those school systems which have succeeded in eradicating all vestiges of de jure segregation. In those systems, the school boards and not the

federal courts will run the schools, absent a showing of an intent to discriminate. We do not think this is a case in which a school board, upon obtaining a judicial decision that it is unitary, turns its back on the rights of its minority students and reverts to its old discriminating ways. If such were the case, we would, of course, not approve Norfolk's new assignment plan. But such is not the case. The school board of Norfolk has done a reasonable job in seeking to keep its schools integrated in the face of a massive exodus of white students. We should not tie its hands and refuse to allow it to try another plan that may be successful in stopping that exodus.

The district court has thoughtfully and carefully considered the complex issues before it, and its judgment is accordingly

AFFIRMED

Filed July 9, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

CIVIL ACTION NO. 83-326-N

PAUL R. RIDDICK, ET AL.,

Plaintiffs,

v.

SCHOOL BOARD OF THE
CITY OF NORFOLK, ET AL.,

Defendants.

MEMORANDUM OPINION

Procedural History of Recent Complaint

This suit was filed by the plaintiffs, parents of public school children, as a class action against the School Board of the City of Norfolk, Virginia, and the members thereof, on May 5, 1983. The suit challenges, on constitutional grounds, a new proposed pupil assignment plan (hereinafter "Proposed Plan") in which cross-

town busing of elementary school children is curtailed. The Proposed Plan was adopted by the School Board on February 2, 1983 and is scheduled for implementation in the school year beginning September, 1984. Plaintiffs contend that the adoption of the Proposed Plan was racially motivated and that its implementation would violate the rights of the plaintiffs under the Fourteenth Amendment.

Defendants contend that the present plan, with its massive crosstown busing, has had the effect of resegregating the school system and that continuation of the present plan would result in even further resegregation. Defendants argue that the Proposed Plan was adopted, in large measure, to promote stability in the school system and thereby to ensure that the Norfolk school system remains as desegregated as possible over the long term.

Past History of Proceedings

Desegregation litigation in Norfolk began in 1956, styled Beckett v. School Board of the City of Norfolk, before Judge Walter E. Hoffman. Beckett, renamed Brewer v. School Board of the City of Norfolk, became the individual docket responsibility of Judge John A. MacKenzie on July 7, 1971, and the district court decisions from that date, to the present, have all been those of Judge MacKenzie.

Following the decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), Brewer v. Norfolk School Board was remanded to the District Court by the Fourth Circuit Court of Appeals, with instructions to obtain from the Norfolk School Board a new desegregation plan which would give effect to Swann. Brewer, sub nom., Adams v. School

District No. 5, Orangeburg County, South Carolina, 444 F.2d 99 (4th Cir. 1971), cert. denied, 406 U.S. 933 (1972).

Acting under that mandate, this Court received a revised desegregation plan from the School Board. This plan, modified in some respects by this Court, was instituted by an Order of this Court entered in July 1971. The plan utilized several different methods of pupil assignment including single school attendance zones, groupings and pairings of schools, and a majority-minority transfer provision. It also ordered crosstown busing as a technique to overcome the remaining vestiges of Norfolk's dual school system. That plan was approved by the Fourth Circuit with the minor change that crosstown busing was to be without cost to the students. This pupil assignment plan, which was subjected

to periodic review over the next several years, is essentially the plan now in effect.

Background

In July 1971, when the current desegregation plan was instituted and busing began, the population of Norfolk was 307,951 of which 70% (215,096) were white and 28% (87,261) were black. The Norfolk school system in 1970 enrolled 56,830 pupils, of which 57% (32,586) were white and 43% (24,244) were black.

By 1983, when the Proposed Plan was adopted by the School Board, the situation had changed significantly. The 1980 Census pegged the population of the City of Norfolk at 266,979 of which 61% (162,300) were white residents and 35% (93,987) were black resident. Total enrollment in the Norfolk school system stood at 35,540 in 1983. And in 1983, the racial composition

of the school system was the following: 58% of the students (20,681) were black and 42% (13,327) were white. In the past twelve years then, there has been a 37% loss in enrollment (21,290) and, specifically, a drop in the white student population of 59% (19,259).

These figures are noteworthy in two respects: first, that the racial composition of the school population had reversed itself, in 1983 it was 58% black, 42% white while in 1970 it had been 57% white and 43% black. Second, while the population of the City of Norfolk was 61% white in 1983, the school population was 42% white. This is to be compared with the situation in 1971 when the City's population was 70% white and the school population was 60% white.

In 1970 there were fifty-four elementary schools. In 1983 there were only

thirty-six. This reflects the shrinking elementary school population as part of the 37% drop overall in school enrollment.

The Proposed Plan

On February 2, 1983, the School Board of the City of Norfolk adopted the Proposed Plan which provides for a change in the system by which pupils in the elementary grades are assigned to schools. The Norfolk school system operates thirty-six elementary schools, and defines the elementary grades to include Kindergarten through Sixth Grade (K-6). (One of the thirty-six elementary schools, Ghent Elementary, is not now and will not become a neighborhood school. It offers an open classroom program and any student may apply for admission to it.) At the present time, there are fourteen single attendance zone schools (an increase of twelve since 1971) while the other elementary students

in the school system are involved in the crosstown busing program. The Board has proposed instead that all elementary students attend single attendance zone schools (otherwise known, somewhat inaccurately, as neighborhood schools), the zones having been drawn to achieve the maximum amount of racial integration. The plaintiffs have not attacked the zones as drawn.

Under the Proposed Plan, crosstown busing for racial balance in Grades K-6 would be eliminated. The Proposed Plan would have the effect of increasing the number of black racially identifiable elementary schools from 7 to 12. (This Court considers a school to be "racially identifiable" if the school population contains more than 70% of a particular race.)

The Proposed Plan includes a Majority-Minority transfer option ("M/M transfer"). No student would be required to attend a school in which his race constitutes more than 70% of the student body. Under the M/M transfer program, the student could transfer, at his parents' option, to a school in which his race constitutes less than 50% of the student body. The school administration has calculated that 10-15% of those eligible for the M/M transfer program would choose to use it in the first year and that up to 30-40% of those eligible would opt for it over the next five years. After considering the evidence of experts for both the plaintiffs and defendants, this Court finds that the school administration's figures are a reasonable estimate of the outcome of the M/M transfer program. This Court therefore finds that the School

Board's figures--calculated on the basis that approximately 17-18% would opt to transfer--give a fair illustration of the effects of the M/M transfer program upon the elementary school population. After M/M transfers, only one elementary school would be over 70% white, i.e., Bayview (74%).

The Norfolk school system also includes Grades Seven-Twelve (7-12), located in eight Junior High Schools, five Senior High Schools and six Special Instruction Schools. These schools are not affected by the Proposed Plan. Under the Proposed Plan, crosstown busing will still be used to achieve racially mixed student bodies in those schools. The Proposed Plan creates a feeder pattern of elementary schools for the assignment of students to Junior High Schools. Each Junior High School will have a racially balanced stu-

dent body as a result. In short, these schools will retain their present characteristics.

While the Proposed Plan also involves the creation of programs designed to improve achievement, parental involvement, cross-cultural contacts and to ensure equal allocation of education resources, the major issues raised in this suit concerned the pupil assignment component.

The 1975 Order in Beckett v. School Board: Its Meaning

As has been pointed out, the desegregation plan for the Norfolk school system was entered in July 1971 by the same judge as here presiding, and remains the framework for the organization of the school system. In 1972, 1973 and 1974, this Court received reports which described, in considerable detail, the operation of the school system. In particular, this Court

reviewed the construction of new schools and the closing of other schools in 1972, 1973 and 1974. An application for the establishment of a transition school to aid school dropouts was opposed by the Beckett plaintiffs, but was nevertheless approved by this Court in August, 1972.

All of this activity culminated in an Order dated February 14, 1975, which is here fully set out:

LEOLA PEARL BECKETT, et al.,	:	
Plaintiffs	:	
v.	:	CIVIL ACTION NO. 2214
THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, et al.,	:	
Defendants	:	

ORDER

It appearing to the Court that all issues in this action have been disposed of, that the School Board of the City of Norfolk has satisfied its affirmative duty to desegregate, that racial discrimination through official action has been eliminat-

ed from the system, and that the Norfolk School System is now "unitary," the Court doth accordingly

ORDER AND DECREE that this action is hereby dismissed, with leave to any party to reinstate this action for good cause shown.

/s/ JOHN A. MacKENZIE
United States Distrtict Judge

Dated: February 14, 1975

We ask for this:

/s/ Henry L. Marsh, III
Counsel for Plaintiffs

/s/ Allan G. Donn
Counsel for Defendants

The language of the Order of February 14, 1975 was fully agreed to by counsel for plaintiffs and defendants. Attorney's fees had been the only issue in the lawsuit for nearly three years before the entry of the Final Decree in February, 1975.

The Order of February 14, 1975, as appears on its face, was more than just a mere order of dismissal. Rather, the Order made specific findings

> "... all issues in this action have been disposed of
>
> "... that the School Board of the City of Norfolk has satisfied its affirmative duty to desegregate
>
> "... that racial discrimination through official action has been eliminated from the system [emphasis added]
>
> "... that the Norfolk School System is now 'unitary'...."

That Order was entered by the same judge who is now hearing this present action, after he had had the case in his charge for over four years and after he had been monitoring the operation of the school system for four years; at a time more than four years after he had ordered into effect the desegregation plan which today provides the structure by which the Nor-

folk school system is organized; at a time when the plan in effect had been unaltered in any appreciable respect since July, 1971, and which, incidentally, has remained essentially unaltered into 1984. No attempt to revive or reinstate the Beckett litigation was made during the nine years which passed from the time the Order was entered in 1975 until the present contest. This Court therefore cannot agree with the present efforts of plaintiffs to label the February 14, 1975 Order as a "Consent" Decree or an Order entered without the consideration of evidence to support its entry.

This Court finds that the Norfolk school system displays today, as it did in 1975, all indicia of "unitariness." In Green v. County School Board, 391 U.S. 430 (1968), the Supreme Court explained that a dual system was one in which,

> [r]acial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations --faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro".

Id., at 435. It has now been twelve years since crosstown busing was introduced and almost 30 years since the start of desegregation litigation in Norfolk. Every piece of evidence in this case points to the fact that the Norfolk school system is unitary: the Norfolk School Board is an integrated body, the Norfolk school administration is racially balanced, the racial composition of the faculty and staff is mixed, and the overwhelming majority of schoolchildren, of both races, on the elementary, junior and senior high school levels, attend schools whose student

bodies are racially mixed. In addition, there has been no contention, nor could there be one, that the extracurricular activities, transportation network and school facilities are operated in a dual fashion. Finally, as noted elsewhere, there has been no challenge to any of the Board's actions in the Beckett litigation since some time before the 1975 Order was entered. Compare, Clark v. Board of Education of the Little Rock School District, 705 F.2d 265 (8th Cir. 1983); United States v. Texas Education Agency, 647 F.2d 504 (5th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

In short, this Court finds that its Order of February 14, 1975, was carefully considered for every phrase it contained. The Order manifested this Court's determination that, as a factual matter, the Norfolk system was free of discrimination and

was unitary in 1975. This Court holds that such a finding was fully justified in 1975 and remains a finding which is today fully justified.

Burden of Proof

What then is the effect of the 1975 Court Order? For the purposes of the present posture of this case, the effect of the Order is to shift the burden of proof from the defendant School Board to the plaintiffs, who must now show that the 1983 Proposed Plan results from an intent on the part of the School Board to discriminate on the basis of race.

It is well-established that a School Board which has maintained a dual school system has committed a constitutional violation. E.g., Keyes v. School District No. 1, 413 U.S. 189 (1973). (The same principle, of course, applies to school systems which have been maintained as dual

by operation of law. Brown v. Board of Education, 347 U.S. 483 (1954).) A dual system is one which is created by state authorities acting intentionally, with discriminatory purpose, to segregate the races. See, Keyes, 413 U.S. at 198; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 6 (1971). When such a constitutional violation has been found, the offending school board is then under a continuing affirmative obligation to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green v. County School Board, 391 U.S. 430, 437-38 (1968); Swann, 402 U.S. 1 (1971). A school board charged with the duty to dismantle an existing dual system bears the burden of justifying its action in light of that duty. See,

Columbus Board of Education v. Penick, 443 U.S. 449, 460-61 (1979); Swann, 402 U.S. 1.

A different situation, however, is present in the suit at bar. This Court, in its 1975 Order, specifically held that the Norfolk School Board had fully discharged its affirmative obligation to create a unitary system, that the school system had shed its dual, de jure segregated character and that the system was unitary. Consequently, the burden now falls upon these plaintiffs to show that the defendant School Board's actions were taken in violation of the Constitution. In order to make this showing, plaintiffs must prove that the Board acted with an intent to discriminate. Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Keyes, 413 U.S. 189.

The presence of discriminatory intent will not be inferred solely from the disproportionate impact of a particular measure upon one race. As the Supreme Court has made clear, "... official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.'" Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 264-265, quoting, Washington v. Davis, 426 U.S. at 242. Moreover, it is clear that the existence of one race or substantially one race schools is not unconstitutional without a showing that such schools were created for the purpose of discriminating on the basis of race. Keyes, 413 U.S. 189; See, Crawford v. Board of Education of the City of Los Angeles, 458 U.S. 527

(1982). Plaintiffs have attempted to carry their burden by pointing to various facts and circumstances regarding the adoption and effect of the Proposed Plan, specifically the following: that the impact of the Proposed Plan is such as to indicate discriminatory intent, that the procedures used by the Board in considering and adopting the Proposed Plan were suspect, that the Board improperly considered the effect of "white flight", and that the Board's stated justifications were pretexts for discrimination.

This Court finds that plaintiffs have failed to satisfy their burden. As will be developed below, the evidence in this case falls short of demonstrating the requisite discriminatory intent.

(The plaintiffs have made several arguments with respect to the allocation of the burden of proof, all of which this

Court rejects. First, plaintiffs argue that Swann requires the School Board to provide a nondiscriminatory justification as to why its Proposed Plan will create some schools with student bodies composed disproportionately of one race. However, Swann is inapplicable here. The questions resolved by the Supreme Court in Swann involved the fashioning of an appropriate remedy for the dismantling of a dual school system. In the case at bar, by contrast, the Norfolk school system has been held to be unitary and the question is whether the School Board has committed a constitutional violation in adopting the Proposed Plan. Second, plaintiffs contended that the principles announced in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), require that this Court strictly scrutinize the Pro-

posed Plan. As discussed in greater depth below, however, Bakke is inapplicable to this case.)

School Resources Allocation

Plaintiffs have argued that as a result of the adoption of the Proposed Plan, and the emergence of a larger number of racially identifiable black schools than presently exists, the resources of the school system might be unequally distributed. Specifically, plaintiffs suggest that the greater concern would be shown to schools with a larger percentage of white enrollment and that the better equipment and better faculty would be diverted to these schools. Such an argument is hardly worth the review of the evidence that thoroughly defeats it.

The School Board of Norfolk is racially mixed, with four white members and three black members. The administration

of the Norfolk school system is now in the capable hands of a very competent and integrated staff. The Superintendent of Schools, Dr. Gene R. Carter, is black. Two of the three Regional Assistant Superintendents are also black. There are 88 principals in the system, 59% are white, 41% are black. The faculty is likewise fully integrated, 56% white, 44% black. When all personnel are counted, including the maintenance staff, administration and faculty, the mix is 47% white, 52% black (1983 figures). Given that the staff is completely integrated and given that very qualified blacks are at the top of the organization, the fear that white students will stand to reap some benefit over black students is totally lacking in credence. And even though it is unlikely that additional oversight is necessary, the Proposed Plan specifically requires periodic

judicial review of the allocation of educational resources, both human and material.

Integration: New Plan as an Aid

A significant amount of expert testimony was solicited during the long trial of this case on the question of whether the scholastic achievement of students, black and white, is affected when the school they attend is racially mixed. In order to evaluate the Proposed Plan, and without attempting to balance the experts, let us assume that integration produces some positive impact upon achievement. Under this assumption, it becomes clear that the goal of any school plan must be to ensure that the greatest number of students of both races remain enrolled. And in fact, one of the purposes of the Proposed Plan is to stabilize elementary school population at its present ratio of

black students and white students, roughly 60-40. There is some speculation that with the Proposed Plan in place the ratio might be narrowed to 55-45.

If the Proposed Plan is successful and the racial composition of the school population stabilizes, the school administration will have considerably more white students for the purpose of integrating the system than it would have if the present plan continues in operation, according to various forecasts. As noted elsewhere in this opinion, even plaintiffs' experts recognize the distinct possibility that Norfolk will go the way of other central core cities whose school populations have become overwhelmingly minority, and that therefore Norfolk's student ratio may dwindle under the present plan to 75-25, black to white or 86-14, black to white, as in nearby Richmond, or even 90-10,

black to white, as in Washington and Baltimore. This Court gives credence to these predictions. Clearly then, given that experts on both sides indicate that stability in the level of white enrollment is a desirable objective, and given the assumption that the achievement of all students may be improved by having an integrated education, the possibility that the Proposed Plan would increase the number of white students would be a strong point in its favor.

Let us suppose the Proposed Plan fails to stem the tide of "white flight" and the racial composition of the student population fails to stabilize at 55-45, or 60-40, black to white. In such a situation, the number of elementary schools that can be racially identified as black will necessarily increase since white students will not be available in sufficient

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numbers to maintain integration. Thus, the failure of the Proposed Plan to retain white students would produce a result no different from that of the continued operation of the present plan.

If stability in the ratio of white elementary students to black elementary students is a proper goal, then a plan which would achieve that goal must be appropriate. If the Proposed Plan is successful, it will produce such a result, but if it fails, the result will be no worse than the outcome which appears to be likely with the continued operation of the present plan -- that is, resegregation. In short, the Proposed Plan represents a reasonable, voluntary attempt on the part of the School Board to ensure that the school system retains the greatest degree of integration over the long term.

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White Flight

The Court finds that the credible evidence in the case at bar reveals that there has been significant "white flight" from the Norfolk school system. Norfolk has experienced two types of "white flight": students who left the system after once having been enrolled in it, and families who have avoided settling in Norfolk but have instead settled in communities such as Virginia Beach or Chesapeake. The Court finds that, as a result of busing, the Norfolk school system has lost between 6000 and 8000 white students who otherwise would have been enrolled there.

The Court further finds that, as a result of this white flight, the Norfolk schools are faced with imminent resegregation. Dr. Crain, one of plaintiffs' key experts, stated in an unguarded moment

that the school population of the City of Norfolk was undoubtedly moving towards a high ratio of black to white. The situation in Norfolk is not unlike that of other nearby cities which, like Norfolk, have an older central core. In Richmond, for example, the racial composition of the student population stands at 86% black, 14% white even though it began at approximately the same level as that in Norfolk. In short, it is clear that the Norfolk school system faces a serious problem brought on by the effects of white flight.

It is well settled that "white flight" cannot be used as a justification for the failure to comply with the Court Order to dismantle a dual school system. The commands of the Constitution may not bend to the popular will. United States v. Scotland Neck Board of Education, 407

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U.S. 484 (1972); Davis v. East Baton Rouge Parish School Board, 721 F.2d 1425 (5th Cir. 1983). However, when the proper set of circumstances exists, white flight may be considered by the school board, and by the Court, in solving the integration equation. See, Parent Association of Andrew Jackson High School v. Ambach, 598 F.2d 705, 720 (2d Cir. 1979); Johnson v. Board of Education of Chicago, 604 F.2d 504, 516 (7th Cir. 1979), vacated and remanded for consideration of subsequent developments, 449 U.S. 915 (1980); Stout v. Jefferson County Board of Education, 537 F.2d 800, 802 (5th Cir. 1976); Higgins v. Board of Education of the City of Grand Rapids, 508 F.2d 779, 794 (6th Cir. 1974). This Court finds, as further developed below, that this case presents circumstances which make consideration of "white flight" appropriate.

Exodus of White Students as a Proper Criterion for Planning

Plaintiffs argue that the School Board bears the burden of proving that the Proposed Plan can survive strict scrutiny under the Equal Protection Clause because the Board allegedly employed racial criteria in designing the Proposed Plan. Specifically, plaintiffs claim that the Proposed Plan is suspect because it was developed in part, to stem white flight and because it has the effect of creating twelve racially identifiable black schools. The plaintiffs cite Bakke, 438 U.S. 265 (1978), as support for this proposition.

The short answer to this argument is that the Proposed Plan does not create an impermissible classification. Under the Proposed Plan, the residence of the child will determine the school to which the

child will be assigned. The Proposed Plan seeks to confer the benefit of neighborhood schooling upon all students in the City, and makes it available to all, regardless of race. See, Crawford, 458 U.S. at 537. The case at bar presents a clear instance of state action which addresses race related matters in neutral fashion. As the Supreme Court has stated, "A neighborhood school policy in itself does not offend the Fourteenth Amendment." Id. at 537, n. 15; Swann, 402 U.S. at 28. Thus, on its face, the Proposed Plan does not establish a classification grounded on race. This distinguishes the case at bar from Bakke in which a medical school overtly considered applicants for admission differently according to race or ethnic origin.

Moreover, there is no evidence in this case to indicate that the Board used "residence" as a factor determining which school a child will attend as a pretext for discriminating on the basis of race. While the Board considered race when drawing up the boundary lines of the various attendance zones, it did so to ensure the maximum amount of integration in each school. Thus, it cannot be said that this line-drawing technique suggests that the Proposed Plan invidiously discriminates on the basis of race. And the fact that the Propose Plan increases the number of racially identifiable black schools to twelve does not, standing alone, dictate a finding that an impermissible classification was established. See, Washington v. Davis, 426 U.S. 229. The evidence has failed to show that the Board intended to

use this Proposed Plan as a subterfuge for a deliberate attempt to discriminate on the basis of race.

Plaintiffs further argue that the Board's consideration of "white flight" was improper. This Court has already found that, as a factual matter, the Norfolk school system has been a victim of "white flight". Certainly, the mere fact that the Board considered the problems of white enrollment loss does not indicate that the Board acted with a discriminatory purpose when it adopted the Proposed Plan.

There is nothing inherently suspect in the Board's consideration of the "white flight" problem in 1983. As noted above, it is established that the possibility of white flight cannot justify a school board's failure to comply with court-ordered desegregation, nor would it excuse actions which would tend to make

the court order unworkable, Scotland Neck Board of Education, 407 U.S. 484; Davis, 721 F.2d 1425. However, those cases are distinguishable from the one at bar because the school board in each of those cases was under court order to dismantle a dual school system. In Norfolk, by contrast, the school system was declared unitary in 1975 and the Board's continuing, affirmative duty to desegregate was discharged at that time. The School Board therefore did not act improperly in 1983 when it took into account the problems of white enrollment loss in considering a pupil assignment plan to ensure that the Norfolk school system would remain integrated over the long term. See, Ambach, 598 F.2d 705; Higgins, 508 F.2d 779. As the Sixth Circuit stated,

> ... It does not follow that a board must ignore the probability of white flight in attempting to formulate a voluntary plan which would improve

> the racial balance in the schools without at the same time losing the support and acceptance of the public.

Higgins, 508 F.2d at 794 (emphasis in original).

Parental Involvement and the Proposed Plan

As noted above, plaintiffs have argued that the Proposed Plan was adopted and designed for the purpose of discriminating on the basis of race, and that the Board's stated justifications for adopting the Proposed Plan were mere pretexts. This Court has determined that the primary objective of the Board in adopting the Proposed Plan -- providing a response to the threat posed by white flight to the long term integration of the Norfolk school system -- was not a pretext for discrimination. This Court also finds that plaintiffs have failed to produce convincing evidence to substantiate their

claim that the School Board's other key objective in adopting the Proposed Plan (i.e., increase the level of parental involvement) was pretextual.

One of the School Board's primary concerns has been the involvement of the parents in the process of education. The evidence produced in this case by both sides is absolutely clear that parental involvement at the elementary school level is essential to the health and well-being of a school system. When asked whether involvement of parents in the school system was desirable, every witness -- sociologists, educators, parents -- responded affirmatively. Dr. Foster, one of plaintiffs' key experts, stated, "... today parental involvement is considered to be one of the most important ingredients for quality education." Tr. at 189. Dr. Albert Ayars, who served as Superintendent

of the Norfolk school system until about a year ago, testified that parental involvement was "vital". Dr. Ayars pointed out that a nationwide Gallup Poll conducted in 1976 revealed that 65% of those responding believed that the "most significant factor" in a child's education was the involvement of parents.

While plaintiffs' acknowledged that parental involvement was important in making a school system successful, they attempted to defend the extent of parental involvement under the present plan. Plaintiffs also tried to intimate that programs to increase parental involvement which are to be implemented in connection with the Proposed Plan could work equally well under the current plan. These efforts fell short. Dr. Ayars, who was particularly well qualified to make such an assessment, stated that crosstown busing had "virtual-

ly destroyed" the PTA in Norfolk. PTA membership has fallen from approximately 15,000-20,000 to a mere 3,500. Dr. Ayars testified that, during his tenure, the school administration engaged in extensive efforts to improve the level of parental involvement and to increase the number of PTA members. One such effort was to offer free transportation to parents to enable them to attend meetings at their children's schools which were across town. However, these efforts were all to no avail.

At trial, individual parents testified that they lacked the transportation, and in many instances the energy, to make the trips to distant schools. These parents also testified, as did Dr. Ayars, conversely, that their interest and involvement would be revived if their children attended an elementary school in the neighborhood.

In short, this Court finds as a factual matter that the Norfolk School Board faced a critical problem caused by the precipitous decline in the level of parental involvement as a result of crosstown busing. Further, this Court has determined that the Proposed Plan constitutes a reasonable solution developed by the School Board to the difficult problem of declining parental involvement. Therefore, contrary to plaintiffs' argument, there is insufficient evidence from which to conclude that this objective of the School Board was, in fact, a pretext for discriminating on the basis of race.

No Alternative Plan

The School Board commissioned Dr. McLaulin to devise another plan as an alternative to the Proposed Plan which divides the City into attendance zones. The purpose of this alternative plan was

to determine whether it would be feasible to retain a system of crosstown busing but at the same time to reduce the amount of time a child would spend on a bus each day. (The evidence proffered here showed that many children spend as much as 45 minutes on a bus traveling just one way to school.) This alternative plan was presented to the community at a series of public hearings held to aid the School Board in its decision-making process. The public was fully informed as to the principle underlying the alternative plan and as to the actual design of the alternative plan. However, the evidence produced in this case clearly established that absolutely no interest was expressed at the public hearings in the alternative plan. Therefore, the alternative plan was appropriately shelved. In short, this Court finds that the alternative plan was never

a viable program and plaintiffs' arguments to the contrary, as well as their attempts to question the consideration which the alternative plan received, are completely unavailing.

The Board's Procedures

Plaintiffs have argued that the procedures used by the Board to consider and adopt the Proposed Plan were suspicious. Plaintiffs further contend that the suspicious nature of this process suggests that the Board acted with discriminatory purpose.

The Court finds, however, that the School Board's decision-making procedures were reasonable and do not indicate that the Board acted with discriminatory intent. There is no evidence of clandestine action on the part of the Board, or even the hint that any took place. Indeed, the facts are to the contrary. The Board

established a special committee, the Ad Hoc Committee, to investigate the matter; later, a committee of the whole Board considered the matter. The Board solicited studies and opinions from further experts (Doctors Green, Edmonds, Lightfoot, Armor) as to various problems facing the school system and as to possible solutions. The Board held a series of six public hearings at different sites throughout the City during which the comments of the community were sought and received. The Board requested the opinions and advice of Dr. Ayars and Dr. Carter as well as those of their staffs. Plaintiffs' criticisms, made with the clear vision of hindsight, amount to no more than a claim that the Board failed to meet a standard of near-perfection in its decision-making process. In short, plaintiffs' criticisms of the Board's procedures do not, considered sep-

arately or in combination, lead to the conclusion or even amount to a suggestion that the Board was in fact acting with an intent to discriminate on the basis of race.

Housing

Plaintiffs have argued that those neighborhood schools which would be racially identifiable as black under the Proposed Plan are those schools which are located in housing projects or areas of subsidized housing, and that therefore the official actions of the housing authorities have, in large part, determined where the children of the residents of those projects will attend school. However, plaintiffs' argument does not lead to a finding that the School Board has acted with discriminatory purpose in the adoption and design of the Proposed Plan.

All of the evidence points out that the slum clearance projects undertaken by the Norfolk Redevelopment and Housing Authority ("NRHA"), and any other agency involved with housing, beginning in the 1950's did, in fact, eliminate areas which were truly slums. The abominable living conditions in those slums were made even worse by the crowding of several families into units designed for single family habitation. These slum areas were occupied by those on the lowest rung of the economic ladder, many of whom were black. Therefore when the slums were cleared, most of those who were displaced were black. The cleared slum areas became the sites of modern housing projects which were, by law, intended to house low income families; space in those projects was,

again by law, to be offered first to those who had been displaced by the demolition of the slum areas.

Today, Norfolk's fifteen public housing projects and seven subsidized housing projects are occupied almost exclusively by black residents. These projects house approximately 25% of Norfolk's black families and, by deduction, 25% of Norfolk's black school children. However, it defies logic to suggest that because the City of Norfolk and the appropriate City agencies had undertaken an aggressive and progressive plan to eradicate unlivable slums and to replace them with modern, affordable living spaces for low income residents, the School Board is responsible in some way for the fact that under the Proposed Plan, the racially identifiable black schools are located in close proximity to those projects. No plaintiff expert wit-

ness suggested that the School Board should have insisted to the City, or to the appropriate City agencies (e.g., the NRHA), that the statutory requirement that those displaced have priority in the assignment of rental units be ignored, that some of the units be made available to those of greater financial means, that the long waiting lists of prospective black tenants (which exist even today) be disregarded or that some of the new accommodations be set aside and held, even if unoccupied, for white residents only. As Justice Powell wrote in Columbus Board of Education v. Penick,

> There are unintegrated schools in every major urban area in the country that contain a substantial minority population. This condition results primarily from familiar segregated housing patterns, which -- in turn -- are caused by social, economic, and demographic forces for which no school board is responsible....

443 U.S. 449, 480 (1979); Cf., Bell v. Board of Education, Akron Public Schools, 683 F.2d 963 (6th Cir. 1982) (discrimination in housing by governmental agencies not imputable to school authorities otherwise innocent of segregative intent). And as Professor Alexander Bickel stated, in a passage quoted by the Court in Penick,

> In most of the larger urban areas, demographic conditions are such that no policy that a court can order, and a school board, a city or even a state has the capability to put into effect, will in fact result in the foreseeable future in racially balanced public schools. Only a reordering of this environment involving economic and social policy on the broadest conceivable front might have an appreciable impact.

Id., at 480.

The focus of the school desegregation cases has been upon the elimination of dual school systems. As Chief Justice Burger stated in Swann,

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objection of Brown I to seek to use the school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination.

402 U.S. at 22-23.

Conclusion

Briefly stated, this Court holds as follows:

1. The 1975 Order entered in Beckett is to be given full force and effect. It was signed four years after this Court ordered crosstown busing, and after this

Court had overseen the operation of the school system for four years. The Order was entered only after due reflection and consideration by this Court. And it is clear, moreover, that the school system displays the various indicia of a unitary system.

2. As a result of the proper findings made in the 1975 Order, that the School Board has satisfied its affirmative duty to desegregate and that the system is unitary, the plaintiffs in this action bear the burden of proof. Plaintiffs must show that the School Board's actions in adopting the Proposed Plan were taken with an intent to discriminate on the basis of race.

3. It is clear to this Court that plaintiffs have failed to sustain their burden. The School Board had two principal reasons for adopting the Proposed Plan

--to try to meet the threat posed by white flight to the integration of the school system over the long term and to attempt to increase the level of parental involvement. The Court finds that there is a factual basis for the School Board's concerns, that the solution proposed by the Board is a reasonable one and was a result of reasoned consideration, and further that the Board's stated justifications for adopting the Proposed Plan were not pretextual. In addition, this Court finds that the Board's procedures in adopting the Proposed Plan were not flawed in any manner which might indicate that the Board was acting with discriminatory purpose.

4. Plaintiffs have attempted to link the actions of the School Board with those of the Norfolk housing agencies for the purpose of establishing that the

School Board acted improperly in designing and adopting the Proposed Plan. This Court concludes, for the reasons stated above, that plaintiffs' argument on this point must also fail.

5. Plaintiffs' motion to set aside the Order of February 14, 1975 in Beckett v. School Board of the City of Norfolk is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
July 9th, 1984.

Filed July 9, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

PAUL R. RIDDICK, ET AL.,

Plaintiffs

v.

CIVIL ACTION
NO. 83-326-N

SCHOOL BOARD OF THE
CITY OF NORFOLK, ET AL.,

Defendants

ORDER

In accordance with a Memorandum Opinion this day filed, this Court finds.

1. That the Pupil Assignment Plan adopted by the School Board of the City of Norfolk on February 2, 1983, is not unconstitutional;

2. That the prayer of plaintiffs for injunctive relief is DENIED; and

3. Plaintiffs' motion to set aside the Order of February 14, 1975 in Beckett v. School Board of the City of Norfolk is DENIED.

It is so ORDERED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
July 9th, 1984.

Filed Feb. 6, 1986

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1815

Paul R. Riddick, Jr., and Phelicia Riddick, infants, by Paul R. Riddick, their father and next friend,

Cynthia C. Perebee, Johnny Perebee, Gary Perebee, and Wilbert Perebee, infants, by Rev. Luther M. Perebee, their father and next friend,

Anita Fleming, infant, by Blanche Fleming, her mother and next friend,

Darrell McDonald and Carolyn McDonald, infants, by Ramion McDonald, Sr., their father and next friend,

Eric E. Nixon and James L. Nixon, infants, by Patricia Nixon, their mother and next friend,

and

Paul R. Riddick, Rev. Luther M. Perebee, Blanche Fleming, Ramion McDonald, Sr., Patricia Nixon, and Annette Owens,

Appellants

versus

The School Board of the City of Norfolk Thomas G. Johnson, Jr., Dr. John H. Foster, Dr. Lucy R. Wilson, Jean C. Bruce, Cynthia A. Heide, Robert L. Hicks, Hortense R. Wells,

Appellees

The Lawyers' Committee for Civil Rights Under Law,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District

Court appealed from, in this cause, be and the same is hereby affirmed.

/s/John M. Greacen
CLERK

Filed March 19, 1986

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1815

Paul R. Riddick, Jr., et al.,

Appellants,

versus

The School Board of the City of Norfolk, et al.,

Appellees.

O R D E R

We have considered appellants' motion to supplement the record and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the motion to supplement the record shall be, and it hereby is, denied.

There having been no request for a poll of the court, it is accordingly **ADJUDGED** and **ORDERED** that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly **ADJUDGED** and **ORDERED** that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Sprouse and Judge Ervin.

/s/
For the Court